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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
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10 **JESSE RODRIGUEZ**, individually and on  
11 behalf of all others similarly situated,

12 Plaintiff,

13 v.

14 **99<sup>th</sup> FLOOR, LLC d/b/a**  
15 **TOPTRADELINES** and JOHN DOES  
16 1-25,

17 Defendant.

Civil Case No.

**CLASS ACTION COMPLAINT AND  
JURY DEMAND**

18 **INTRODUCTION**

- 19 1. Plaintiff Jesse Rodriguez (“Plaintiff”) brings this Class Action Complaint for damages,  
20 injunctive relief, and any other available legal or equitable remedies, resulting from 99<sup>th</sup>  
21 Floor, LLC’s (“Defendant”) practice of sending automated telemarketing text messages  
22 to cellular telephones without prior express written consent, in violation of the Telephone  
23 Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”), the Washington  
24 Commercial Electronic Mail Act, RCW § 19.190 *et seq.*, (“CEMA”), and the Washington  
25 Consumer Protection Act, RCW § 19.86 *et seq.*, (“CPA”).  
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**JURISDICTION**

2. This Court has federal question jurisdiction because this case arises out of violations of 47 U.S.C. § 227 *et seq.*, a federal law. The Court also has pendent jurisdiction over the state law claims in this action pursuant to 28 U.S.C. § 1367(a).
3. Venue is proper in the United States District Court for the Western District of Washington pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in Washington.

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**PARTIES**

4. Plaintiff is, and at all times mentioned herein was, a citizen and resident of the State of Washington. Plaintiff is, and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153(10), RCW 19.190.010(11), and RCW 19.86.010(1).
5. Defendant is, and at all times mentioned herein was, a corporation duly organized under the laws of the State of Florida with its headquarters at 1000 Ponce De Leon Boulevard, Suite 103, Coral Gables, Florida 33134-3354. Defendant, is and at all times mentioned herein was, a "person" as defined by 47 U.S.C. § 153 (10), RCW 19.190.010(11), and RCW 19.86.010(1).
6. John Does 1-25, are fictitious names of individuals and businesses alleged for the purpose of substituting names of Defendants whose identities will be disclosed in discovery and should be made parties to this action.

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**BACKGROUND**

7. The TCPA was enacted to protect consumers from the invasion of privacy caused by "unrestricted telemarketing." Congress found that "[b]anning such automated or prerecorded telephone calls ... except when the receiving party consents to receiving the

1 call ... is the only effective means of protecting telephone consumers from this nuisance  
2 and privacy invasion.” 47 U.S.C. § 227 (Congressional Statement of Findings).

3 8. Accordingly, the TCPA makes it unlawful for any person “to make any call (other than a  
4 call ... made with the prior express consent of the called party) using any automatic  
5 telephone dialing system...to any telephone number assigned to a...cellular telephone  
6 service.” 47 U.S.C. 227(b)(1)(A)(iii).

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8 9. This prohibition encompasses both voice and text calls, including short message service  
9 (SMS) messages (commonly known as “text messages”). 18 FCC Rcd. 14014 at 14115,  
10 ¶ 165; *see also Gager v. Dell Fin. Servs., LLC.*, 727 F.3d 265, 269 (3d Cir. 2013).

11  
12 10. An “automatic telephone dialing system” is defined as “equipment which has the capacity  
13 (A) to store or produce numbers to be called, using a random or sequential number  
14 generator; and (B) to dial such numbers.” 47 U.S.C. 227(a)(1).

15 11. The Federal Communication Commission (“FCC”) has emphasized that this definition  
16 “covers any equipment that has the specified *capacity* to generate numbers and dial them  
17 without human intervention regardless of whether the numbers called are randomly or  
18 sequentially generated or come from calling lists.” 27 FCC Rcd. 15391 at 15392, n.5; *see*  
19 *also, e.g.*, 18 FCC Rcd. 14014 at 14092, ¶ 132 (concluding that predictive dialers fall  
20 within the statutory definition because of their “capacity to dial numbers without human  
21 intervention.”).

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23 12. In 2012, the FCC issued a rule requiring consent to be in writing “for all telephone calls  
24 using an automatic telephone dialing system...to deliver a telemarketing message to  
25 wireless numbers[.]” 27 FCC Rcd. 1830 at 1838, ¶ 20. This rule went into effect on  
26 October 16, 2013. *Id.* at 1857, ¶ 66.  
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- 1 13. As codified, “prior express written consent means an agreement, in writing, bearing the  
2 signature of the person called that clearly authorized the seller to deliver or cause to be  
3 delivered to the person called advertisements or telemarketing messages using an  
4 automatic telephone dialing system ... and the telephone number to which the signatory  
5 authorized such advertisements or telemarketing messages to be delivered.”  
6 64 CFR § 1200(f)(8).  
7
- 8 14. If there is doubt as to consent, “the seller ... bear[s] the burden of demonstrating that a  
9 clear and conspicuous disclosure was provided and that unambiguous consent was  
10 obtained.” 27 FCC Rcd. 1830 at 1844, ¶ 33.  
11
- 12 15. For non-telemarketing calls, prior express consent is still necessary, but it can be given  
13 orally or in writing. *Id.* at ¶ 28.
- 14 16. The TCPA provides for a private right of action and statutory damages of \$500 per call  
15 or text for negligent violations of the TCPA, and \$1,500 per call or text for knowing  
16 and/or willful violations of the TCPA. 47 U.S.C. § 227(b)(3).  
17
- 18 17. While the TCPA itself does not define “willful,” “the Communications Act of 1943, of  
19 which the TCPA is a part, defines willful as ‘the conscious or deliberate commission or  
20 omission of such act, irrespective of any intent to violate any provision[s], rule or  
21 regulation.’ *Roylance v. ALG Real Estate Servs.*, Case No. 5:14-cv-02445-PSG, 2015  
22 U.S. Dist. LEXIS 44930, 31 (N.D. Cal. Mar. 16, 2015); *see also, e.g., Sengenberger v.*  
23 *Credit Control Servs., Inc.*, Case No. 09-c-2796, 2010 U.S. Dist. LEXIS 43874 (N.D. Ill.  
24 May 5, 2010) (“[C]ourts have generally interpreted willfulness to imply only that an  
25 action was intentional.”).  
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1 18. In enacting the TCPA, Congress gave the FCC the authority to exempt certain calls and  
2 texts from the TCPA’s prohibitions.

3 19. One such exemption allows “package delivery companies to alert wireless consumers  
4 about their packages.” 29 FCC Rcd. 3432 at ¶ 1.

5 20. However, the FCC held that for such delivery notifications to be exempt, the  
6 “notifications must not include any telemarketing, solicitation, or advertising content.”  
7  
8 *Id.* at 3437, ¶ 18.

9 21. The FCC has similarly exempted text messages confirming an individual’s request to opt  
10 out of future text messages, so long as, *inter alia*, the “opt out” confirmation message  
11 “does not contain marketing [or] solicitations.” The FCC wrote:

12  
13 [T]exts that clearly contain marketing or promotional materials  
14 (such as “your request to opt out of future messages will be honored  
15 but we are offering you a 10% discount on our products”) and texts  
16 that encourage consumers to call or otherwise contact the sender in  
17 an attempt to market, including such texts that, while neutral on their  
18 face, lead to a marketing message if the consumer contacts the  
19 sender, are likely beyond the scope of the consumer’s prior consent.  
20 We will monitor consumer complaints and take appropriate action  
21 if senders are using confirmation texts as an additional opportunity  
22 to market.

23 27 FCC Rcd. 15391 at 15397 ¶ 12.

24 22. Accordingly, from both the plain language of the TCPA and subsequent FCC language  
25 regarding comparable types of calls and texts, by automatically sending telemarketing  
26 text messages to Plaintiff and Class members in “response” to the text messages received  
27 from Plaintiff and class members, Defendant violated the TCPA.

### 28 **FACTUAL ALLEGATIONS**

23. Defendant owns and operates several domain names including [www.toptradlines.com](http://www.toptradlines.com)  
and [www.deletionexpert.com](http://www.deletionexpert.com).

- 1 24. Defendant's main business is credit repair.
- 2 25. Defendant utilizes sending mass text messages as an advertising tool.
- 3 26. Many of the text messages sent are unsolicited and without the recipients' express
- 4 consent.
- 5 27. On August 31, 2015, Defendant sent an automated unsolicited text message from
- 6 telephone number (786) 347-3780 to Plaintiff's cellular telephone number
- 7 (206) 538-7255, containing an advertisement for services the Defendant offers.
- 8
- 9 28. Plaintiff is the sole subscriber of the cellular phone account bearing the phone number of
- 10 (206) 538-7255, and has been the sole subscriber of that account at all times relevant
- 11 hereto.
- 12
- 13 29. Plaintiff is the sole party financially responsible for the payment of the cellular phone
- 14 account bearing the phone number of (206) 538-7255, and has been the sole party
- 15 financially responsible for that account at all times relevant hereto.
- 16
- 17 30. Plaintiff is the customary and sole user of the cellular phone number (206) 538-7255, and
- 18 has been the customary and sole user of that phone number at all times relevant hereto.
- 19
- 20 31. On October 06, 2015, Defendant sent another automated unsolicited text message to
- 21 Plaintiff's cellular telephone containing an advertisement for services the Defendant
- 22 offers.
- 23 32. On October 31, 2015, Defendant sent an automated unsolicited text message to Plaintiff's
- 24 cellular telephone containing an advertisement for services the Defendant offers. See
- 25 attached screenshot showing the above three text messages marked as **Exhibit A**.
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1 33. On November 07, 2015, Defendant sent an automated unsolicited text message to  
2 Plaintiff's cellular telephone containing an advertisement for services the Defendant  
3 offers.

4 34. On November 13, 2015, Defendant sent an automated unsolicited text message to  
5 Plaintiff's cellular telephone containing an advertisement for services the Defendant  
6 offers. See attached screenshot showing the above two text messages marked as  
7  
8 **Exhibit B.**

9 35. Plaintiff did not provide express written consent to receive this telemarketing message  
10 from Defendant, as required by the TCPA.

11 36. All of the aforementioned text messages, as well as similar text messages not specifically  
12 mentioned herein, are sent using an automatic telephone dialing system as defined at 47  
13 U.S.C. § 227(a)(1) and as clarified in subsequent FCC interpretations. The system(s) used  
14 to send these text messages had the capacity to store or produce numbers to be called  
15 using a random or sequential number generator and to dial such numbers. The system(s)  
16 also had the capacity to send text messages to cellular phones without human  
17 intervention.  
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19 37. These are not mere "technical" violations of the TCPA either. Upon information and  
20 belief, Defendant obtains a substantial amount of business by sending out these text  
21 messages.  
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23 38. Plaintiff did not provide express to Defendant to send a telemarketing text message to his  
24 cellular telephone using an automatic dialing system (or otherwise).  
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1 39. As a result, Plaintiff suffered actual damages as a result of the invasion of privacy,  
2 nuisance, and time spent reading and interacting with the unsolicited text advertisement,  
3 as well as in the form of data and device storage usage.

4 40. Plaintiff is also entitled to statutory damages pursuant to 47 U.S.C. § 227(b)(3)(B) and  
5 (C); RCW 19.190.040(1); and RCW 19.86.090.

6 41. Upon information and belief, Plaintiff is one of thousands to receive this or similar  
7 unsolicited and automated text message solicitations from Defendant.  
8

9 **CLASS ACTION ALLEGATIONS**

10 42. Plaintiff brings this action under Fed. R. Civ. P. 23 on behalf of a proposed class defined  
11 as:  
12

13 Plaintiff and all persons within the United States 1) who, since  
14 November 23, 2011, received, from a number owned, operated, or  
15 controlled by Defendant, 2) a telemarketing text message 3) sent  
16 through the use of an automatic telephone dialing system 4) to said  
person's cellular telephone 5) when said person had not provided  
express written consent to receive such messages.

17 ("Class")

18 43. For the purposes of this class definition, "telemarketing text message" is defined as any  
19 text message containing 1) a hyperlink, masked or otherwise, to a non-Defendant-owned  
20 entity's website, or to the location where the entity's products or services can be acquired,  
21 when said entity gave to Defendant any consideration in exchange for advertising  
22 placements; or 2) a reference to the name of any non-Defendant-owned entity or a  
23 reference to any non-Defendant-owned entity's products, services, or offerings, when  
24 said entity gave to Defendant any consideration in exchange for advertising placements.  
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26 44. Excluded from this class are Defendant and any entities in which Defendant has a  
27 controlling interest; Defendant's agents and employees; any Judge and Magistrate Judge  
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1 to whom this action is assigned and any member of their staffs and immediate families,  
2 and any claims for personal injury, wrongful death, and/or emotional distress.

3 45. The Class for whose benefit this action is brought is so numerous that joinder of all  
4 members is impracticable.

5 46. The exact number and identities of the persons who fit within the Class are ascertainable  
6 in that Defendant maintains written and electronically stored data showing:

- 7
- 8 a. Which messages were programmed to which telephone numbers;
  - 9 b. The time period during which these messages were programmed to be sent;
  - 10 c. In which circumstances which messages were sent;
  - 11 d. The number of times those telephone numbers received and sent text messages; and
  - 12 e. The telephone number of each individual to whom a text message was sent.

13 47. The proposed Class is comprised of tens or hundreds of thousands of individuals, if not  
14 more.

15 48. There are common questions of law and fact affecting the rights of the class members,  
16 including, *inter alia*, the following:

- 17
- 18 a. Whether the text messages constitute solicitations under the TCPA;
  - 19 b. Whether Defendant used an automatic dialing system to send these text messages;
  - 20 c. Whether Defendant adequately disclosed that the responding text would contain an  
21 advertisement;
  - 22 d. Whether Plaintiff and the Class were damaged thereby, and the extent of damages for  
23 such violation; and
  - 24 e. Whether Defendant should be enjoined from engaging in such conduct in the future.
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1 49. Plaintiff is a member of the Class in that he received an unsolicited automated  
2 telemarketing text from Defendant in response to his text message.

3 50. The claims of Plaintiff are typical of the Class members in that they arise from  
4 Defendant's uniform policies and automatic responses, and are based on the same legal  
5 theories of all Class members.

6 51. Plaintiff and all putative Class members have also necessarily suffered actual damages in  
7 addition to statutory damages, as the text messages at issue took up space on putative  
8 Class members' devices, caused a nuisance to Class members, and invaded their privacy.

9 52. Plaintiff has no interest antagonistic to, or in conflict with, the Class.

10 53. Plaintiff will thoroughly and adequately protect the interests of the Class, having retained  
11 qualified and competent legal counsel to represent himself and the Class.

12 54. Defendant has acted and refused to act on grounds generally applicable to the Class,  
13 thereby making appropriate injunctive and declaratory relief for the class as a whole.

14 55. The prosecution of separate actions by individual class members would create a risk of  
15 inconsistent or varying adjudications.

16 56. A class action is superior to other available methods for the fair and efficient adjudication  
17 of the controversy since, *inter alia*, the damages suffered by each class member make  
18 individual actions uneconomical.

19 57. Common questions will predominate, and there will be no unusual manageability issues.

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24 **COUNT I**

25 **NEGLIGENT VIOLATIONS OF THE TCPA 47 U.S.C. § 227 Et Seq.**

26 **(On behalf of Plaintiff and the Putative class)**

27 58. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though  
28 fully stated herein.

1 59. The foregoing acts and omissions of Defendant constitute numerous and multiple  
2 negligent violations of the TCPA, including but not limited to each and every one of the  
3 above-cited provisions of 47 U.S.C. § 227 *et seq.*

4 60. As a result of Defendant's negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and  
5 each member of the Class are entitled to an award of \$500.00 in statutory damages, for  
6 each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).  
7

8 61. Plaintiff and each member of the Class are also entitled to and seek injunctive relief  
9 prohibiting such conduct in the future.  
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## 11 **COUNT II**

### 12 **KNOWING AND/OR WILLFUL VIOLATIONS OF THE TCPA 47 U.S.C. § 227 Et Seq.**

#### 13 **(On behalf of Plaintiff and the Putative Class)**

14 62. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though  
15 fully stated herein.

16 63. The foregoing acts and omissions of Defendant constitute numerous and multiple  
17 knowing and/or willful violations of the TCPA, including but not limited to each and  
18 every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*  
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20 64. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*,  
21 Plaintiff and each member of the Class are entitled to an award of \$1,500.00 in statutory  
22 damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47  
23 U.S.C. § 227(b)(3)(C).  
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25 65. Plaintiff and each member of the Class are also entitled to and seek injunctive relief  
26 prohibiting such conduct in the future.  
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**COUNT III**

**VIOLATIONS OF THE WASHINGTON CEMA RCW 19.190 Et Seq.**

66. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
67. Washington's CEMA prohibits the "transmission of an electronic commercial text message to a telephone number assigned to a Washington resident for cellular telephone service . . . allowing the transmission of text messages." RCW 19.190.060 (1).
68. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the CEMA, including but not limited to the above-cited provision of RCW 19.190 et seq.
69. As a result of Defendant's violations of CEMA, Plaintiff and each member of the Class are entitled to an award of \$500.00, or actual damages, whichever is greater, for each and every violation, pursuant to RCW 19.190.040(1).
70. Plaintiff and each member of the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

**COUNT IV**

**VIOLATIONS OF THE WASHINGTON CPA RCW 19.86 Et Seq.**

71. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.
72. Under Washington's CEMA, an unlawful transmission of an electronic commercial text message "is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the consumer protection act, chapter 19.86 RCW." RCW 19.190.060 (2).

1 73. The foregoing acts and omissions of Defendant constitute numerous and multiple  
2 negligent violations of the CPA, including but not limited to the above-cited provisions  
3 of the TCPA and the CEMA.

4 74. By reason thereof, Defendant is liable to Plaintiff for judgment that Defendant's conduct  
5 violated the Washington Consumer Protection Act, actual damages, statutory damages,  
6 costs and attorneys' fees. RCW 19.86.090.

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8 75. Plaintiff and each member of the Class are also entitled to and seek injunctive relief  
9 prohibiting such conduct in the future.

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11 **PRAYER FOR RELIEF**

12 **WHEREFORE**, Plaintiff and members of the Class respectfully pray for the following relief:

- 13 a) Certification of the Class under Fed. R. Civ. P. 23;
- 14 b) On the First Count, as a result of Defendant's negligent violations of 47 U.S.C. §  
15 227(b)(1)(A)(iii), Plaintiff and each member of the Class is entitled to and requests  
16 five hundred dollars (\$500.00) in statutory damages, for each and every violation,  
17 pursuant to 47 U.S.C. § 227(b)(3)(B);
- 18 c) On the Second Count, as a result of Defendant's willful and/or knowing violations of  
19 47 U.S.C. § 227(b)(1)(A)(iii), Plaintiff and each member of the Class is entitled to  
20 and requests treble damages, as provided by statute, up to one thousand five hundred  
21 dollars (\$1,500.00), for each and every violation pursuant to 47 U.S.C. § 227(b)(3)(B)  
22 and 47 U.S.C. § 227(b)(3)(C);
- 23 d) On the Third Count as a result of Defendant's violations of RCW 19.190 et seq.,  
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25 Plaintiff and each member of the Class is entitled to and requests damages, as  
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1 provided by statute, up to five hundred dollars (\$500.00), or actual damages,  
2 whichever is greater, for each and every violation pursuant to RCW 19.190.040.

3 e) On the Fourth Count as a result of Defendant's violations of RCW 19.86 et seq.,  
4 Plaintiff and each member of the Class is entitled to and requests damages, as  
5 provided by statute, for each and every violation pursuant to RCW 19.86.090.

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7 f) An order, pursuant to 47 U.S.C. § 227(b)(3)(A), enjoining Defendant from violating  
8 47 U.S.C. § 227(b)(1)(A)(iii);

9 g) Attorney's fees and costs; and

10 h) Such other and further relief as the Court may deem just and proper.  
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1 Dated: January 5, 2016

Ryan Pesicka #48182

2 s/ Ryan Pesicka

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Attorney for Plaintiff

20 **DEMAND FOR JURY TRIAL**

21 Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiff, individually and  
22 on behalf of all others similarly situated, demands a trial by jury on all questions of fact raised by  
23 the Complaint.

24 Dated: January 5, 2016

s/ Ryan Pesicka

Ryan Pesicka 48182